79-1217

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 1729

LAWRENCE A. UZZELL and
ROBERT LANE ARRINGTON,
Individually, and upon behalf
of all other similarly situated, et al.,
Petitioners,

v.

WILLIAM C. FRIDAY, Individually
and as President of the University of
North Carolina, et al.,
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
OPINION of the United States District Court for the Middle District of North Carolina, entered September 17, 1975 [401 F.Supp. 775]	1-A
OPINION of the United States Court of Appeals for the Fourth Circuit, entered January 5, 1977 [547 F.2d 801]	15-A
OPINION of the United States Court of Appeals for the Fourth Circuit, en banc, entered July 28, 1977 [558 F.2d 727]	24-A
OPINION of the United States Court of Appeals for the Fourth Circuit, en banc, entered February 2, 1979 [591 F.2d 997]	29-A

401 F.Supp. 775 (1975)

In The

UNITED STATES DISTRICT COURT

Middle District of North Carolina

Durham Division

No. C-74-178-D

Lawrence A. UZZELL and Robert Lane Arrington, Individually, and upon behalf of all others similarly situated,

Plaintiffs,

v.

William C. FRIDAY, Individually, and as President of the University of North Carolina, et al.,

Defendants,

and

Algenon L. MARBLEY, Chairman of the Black Student Movement and Robert L. Wynn, II, Vice-Chairman of Black Student Movement,

Additional Defendants.

[776]

Hugh J. Beard, Jr., Charlotte, N.C., for plaintiffs.

Andrew A. Vanore, Jr., Deputy Atty. Gen., Raleigh, N.C., for defendants.

James V. Rowan, James B. Gillespie, Jr., and Karen Bethea Galloway, Durham, N.C., for additional defendants.

MEMORANDUM OPINION

GORDON, Chief Judge.

This case is before the Court on defendants' motion to dismiss or, alternatively, for summary judgment in an action brought by two students at the University of North Carolina at Chapel Hill challenging certain practices of the University and the Campus Governing Council (CGC) as violations of the Fourteenth Amendment and 42 U.S.C. §§ 1983 and 2000d. While there are twelve causes of action alleged, the plaintiffs in essence challenge three separate practices:

(1) The disbursement of funds collected from mandatory student fees to the Black Student Movement (BSM), a group composed exclusively of black students whose membership policies are allegedly discriminatory and whose purpose is allegedly the promotion of a separate racial and cultural identity;

(2) the provisions for minority representatives on the Campus Governing Council (CGC) authorizing appointment and membership solely upon the basis of race; and

(3) the provision for appointment to the Student Honor Court solely on the basis of race.

The plaintiffs allege this suit to be a class action and seek declaratory and injunctive relief.

The plaintiffs allege that each of the three above practices of the University are violations of 42 U.S.C. § 1983 in that they deny plaintiffs equal protection of the laws, and of 42 U.S.C. § 2000d in that the practices deprive the plaintiffs of full participation in and the equal benefit of the University, a "pro-

[777]

gram or activity receiving Federal financial assistance." The defendant University and the BSM, defendant-intervenors, move to dismiss or, in the alternative, for summary judgment, on the grounds that the claim concerning BSM subsidization should be dismissed as moot

or for lack of standing; that the claim concerning CGC representation be dismissed for lack of cause and controversy; and that the claim challenging honor court appointment be dismissed for lack of standing.[1] These issues will be resolved on the defendants' summary judgment motions since the Court will consider the many affidavits and answers to interrogatories in the record which are pertinent to the motions before the Court.

The issues before the Court raise questions of substantial difficulty which apparently have not been ruled on by other courts. The defenses of lack of standing and case and controversy make resolution particularly troublesome since they compel consideration of imprecise constitutional doctrines in a case involving claims of a largely unprecedented nature. As a result, this memorandum opinion, sailing an unchartered course, will inevitably pitch and toss in trying to steer between complex constitutional questions and unprecedented applications of § 1983 and § 2000d.

I.

The Court turns first to the issue of mootness with respect to plaintiff's claim concerning disbursements to the BSM. The BSM is an organization at the University "that recognizes the distinctly different cultural and historical evolution of the Black community vis-a-vis that of the broader society . . . " and whose goals are

1. The defendants also move to dimiss all claims for failure to exhaust administrative remedies and to dismiss the class aspect of the case for failure to satisfy Rule 23 requirements. The exhaustion argument cannot be seriously considered in light of McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), certiorari granted Burrell v. McCray, ___ U.S. ___, 96 S.Ct. 264, 46 L.Ed.2d 249, and the class action argument need not be considered because of the resolution of the other motions.

"to strive for the continued existence of unity among all [BSM] members on this campus; offer outlets for expressing Black ideas and culture; and . . . to insure that . . . [BSM] members on the campus . . . never lose touch with the culture of the Black Community." (Preamble to the Constitution of the Black Student Movement.) From its inception in 1967 until September 1974, the membership policy of the BSM was limited to black students at the University. On September 18, 1974, the membership policy was amended to allow any student, regardless of race, to be a BSM member if the views of the applicant are consistent with the goals of the BSM as stated in the Preamble. (Art. III. A. Black Student Movement Constitution, Resolution of September 18, 1974.) At present, all the members of the BSM are black.

The defendants contend that the present nondiscriminatory membership policy and the intent of both the BSM officials and University officers, as evidenced by affidavits, ensure a non-exclusive membership policy and, thus, render this claim moot. At the hearing, the attorney for the BSM stated that the new membership policy is truly open and non-exclusive, that no one has ever been turned down for membership and that the purposes and goals of the BSM, while of course focused on the black experience at the University and black culture, are not inconsistent with integrated membership policies. Finally, the defendant University, while conceding that the mere cessation of the challenged illegal activity does not moot the challenge, argues that the University policy of prohibiting disbursement of stundent funds to a racially exclusive organization is so clear and its commitment to implementation of the policy so unequivocal that the case is moot since there is no possibility of a recurrence of the challenged activity.

[778]

The plaintiff contends the controversy is not moot on several grounds, both factual and legal. Firstly, the plaintiff argues that the membership policy is still exclusive since the condition of membership requiring adherence to the preamble and the review of membership applications by a BSM membership committee allow for effective control of non-black membership and potential discrimination. The plaintiff argues that, in light of the past history of exclusive membership, the conditions for membership and the present all black membership amount to de facto exclusivity or raise at least a presumption of discrimination which should allow plaintiff's claim to withstand the mootness defense. Secondly, the plaintiffs assert that even if the BSM membership policies are no longer exclusive, the case should not be judged moot unless it is reasonably clear that the wrongful activity will not recur. In support of their position that there remains a cognizable danger of a recurrent violation, plaintiffs point to the funding of the BSM by student government with the approval of University officials for several years while the organization was racially exclusive. They point out that this funding was done with knowledge of the exclusivity and that the membership policy only changed after institution of this suit. They argue that the cessation of the activity and the declaration of intent not to reinstitute the policy is not sufficient to render this controversy moot.

The first determination on this issue is a factual one. The language of the new constitutional provision regarding BSM membership and particularly the language of the September 18 resolution manifests a clear intent to allow membership in the BSM on a non-discriminatory basis. Moreover, the affidavit of the Chairman of the BSM clearly expresses the membership policy of the BSM to be without regard for race. It is concluded that the BSM has changed

its membership policy from black exclusivity and discrimination against whites to a stated policy of open membership subject to the condition of adherence to the Preamble.

Careful consideration of the University and student government policies also discloses a change from a policy which apparently allowed the subsidization of racially discriminatory organizations to one which clearly prohibits such funding. The affidavit of Marcus Williams, the Student Body President, states the policy of Student Government to be that all student organizations must operate under an open membership policy without regard to race and declares the intent to terminate the funding with student fees of any organization violating that policy. This statement of policy is confirmed by the affidavit of the Treasurer of the Student Government and Dean Donald Boulton, the Dean of Student Affairs.

Furthermore, this policy of subsidizing only organizations whose membership is non-exclusive and open is mandated by The Revised North Carolina State Plan for the Further Elimination of Racial Duality in the Public Post-Secondary Education Systems adopted on May 31, 1974, by the Board of Governors of the University of North Carolina (see affidavit of John P. Kennedy, Jr.). These unambiguous promulgations of present University policy with regard to the subsidization of campus organizations and BSM policy as to membership compel the conclusion that the activity challenged by plaintiffs in their first, second, seventh and eighth claims for relief has ceased and that it is the clearly declared intent of the defendants and intervenors that it not be reinstituted.

This brings on for determination a legal question; that is, whether cessation of the challenged activity renders the controversy with respect to this challenged practice

[779]

moot. While there is some dispute as to the proper standard for finding mootness when the defendant has discontinued the challenged acts, "the test of mootness is whether the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated." Wright, Miller & Cooper, *Federal Practice and Procedure*, Vol. 13, §§ 3533 t 282; *United States v. W. T. Grant Co.*, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1953). As the commentators state, the prediction of possible recurrence of the challenged activity is often difficult and must to some degree depend on "individualized judgment and intuition." Wright, Miller & Cooper, at 282-83. However, in the area of official action, courts have been more receptive to declarations that abandoned illegal policies will not be reinstated particularly when, as in this case, the challenged policy is terminated altogether and not just its application in particular circumstances. Wright, Miller & Cooper, at 283-85, Cf. *Blackwell v. Thomas*, 476 F.2d 443, 445-46 (4th Cir. 1973).

The Court concludes that the clearly stated directives and policies of the University, filed with the Department of Health, Education and Welfare and acquiesced in by the student officials charged with their implementation, to terminate funding to any organization with discriminatory membership policies meets the burden of showing "no reasonable expectation" of recurrence.

[1] The apparent sincerity of all involved and the written promises or policies not to reinstitute the challenged activities along with the visibility of the defendants and their action preclude a serious danger that the challenged practices will be reinstituted. The Court shares plaintiffs' legitimate concern raised by the past subsidization of the BSM when its membership was exclusive. The Court strongly condemns the approving University officials and the student

government officials who, with apparent knowledge, for several years disbursed funds collected from mandatory student fees to an organization whose membership policy clearly excluded everyone except black students. However, the membership policy of the BSM has changed and the policy of the University has come full circle to an unequivocal refusal to fund any racially exclusive organization, perhaps as a result of this lawsuit as plaintiffs contend. For this reason, summary judgment is granted for defendants and defendant-intervenor, BSM, on the first, second, seventh and eighth claims for relief on the ground of mootness. The Court hastens to tell the plaintiffs and to admonish the defendants that if the University should intentionally or unintentionally again begin to fund any racially exclusive organization or should the BSM not be truly open to members of all races while it receives state funds,[2] the Court will not be reluctant to entertain this same lawsuit.

II.

The plaintiffs challenge the minority representation provision of the Student Constitution which requires that there be at least two blacks, two women and two men on the Campus Governing Council (and if this number is not elected, the President of the Student Body must appoint members of such race or sex to comply with the requirement). The defendants seek summary judgment on this

2. A truly open and non-exclusive membership policy requires more than a mere paper promise. The BSM must neither discourage, subtly or discretely, non-black membership in their organization nor may they use the condition of adherence to the BSM preamble to control non-black membership. There should be a presumption that all who seek membership are eligible to join and should be accepted. Any indication of discrimination by the BSM in its membership policies would be grounds for giving this lawsuit renewed vitality.

claim because of the undisputed fact that the provision has never been utilized since its enactment and, consequently, they argue there exists no case or controversy with respect to this claim.

[780]

[2] The defendants' motion is granted for two reasons. The first is the one pressed by them that this provision has never been used and therefore no rights of the plaintiffs have been affected. This renders the claim hypothetical and the impact of any decision would have no direct effect on the status of the litigating parties.

However, there is a more fundamental reason for dismissing the claim for lack of case or controversy. The plaintiffs contend that 42 U.S.C. § 1983 and § 2000d guarantee them a right to attend a state university free from officially imposed or sanctioned discrimination and that a taxpayer or feepayer should not be compelled to subsidize a university which imposes or sanctions discrimination. They argue that these rights were violated at the moment the provision was adopted since, at that point, the defendants began using racial criteria in evaluating representation on the CGC. This argument, it is concluded, does not raise a case or controversy which is appropriate for resolution by this Court.

[3] In a strict sense, the claim fails to state a claim or controversy because the effect of this provision is in no way discriminating toward plaintiffs. The provision allows for the appointment of blacks, females *and males* to ensure representation on the CGC and while such a provision may be questioned as a matter of political values or constitutional principle, it cannot, even when implemented, be argued to have an injurious effect on the plaintiffs. *See* Wright, Miller & Cooper, § 3531 at 200. The plaintiffs contend that the existence of the provision

imposes a racial criteria in the evaluation of the members of the CGC but the Court is unable to perceive how that translates into a legal interest or cognizable injury to the plaintiffs which can form the basis of a claim raising a case or controversy suitable for adjudication.

On a less technical level, the Court feels summary judgment should be granted on this claim, not necessarily pursuant to any specific judicial doctrine, but because the claim does not warrant judicial review.[3] The Court adopts the following reasoning:

> "There is no reason to demand a final expression in terms of standing, ripeness, mootness, or political question doctrine, if the court is able to conclude that there is no sufficient need for deciding the issues tendered without relying on the frequently question-begging terminology of any single concept." Wright, Miller & Cooper, § 3529 at 153.

[4] It is the opinion of the Court that the issue raised by this claim is not appropriate for judicial relief and that the denial of judicial relief will cause no hardship to any party. Wright, Miller & Cooper, § 3259 at 141. It is felt that the challenge to the CGC provision is not appropriate for judicial relief because it would involve the Court in a purely policy determination, the resolution of which would have no effect on the status or welfare of the parties involved. The policy of CGC appointment deserves neither judicial approval or condemnation for, as it stands now, it does not affect the rights or interests of any student at the University to a degree which is traditionally susceptible of judicial remedy.

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3. The belief that the claim is not justiciable in a broad sense does not indicate conern about the decision to grant summary judgment on the more tangible case and controversy theory. It is felt that both grounds are equally convincing.

[5] Therefore, summary judgment is granted in favor of the defendants on the third, fourth, ninth and tenth claims for relief on the grounds that the claim challenging the CGC appointment provision does not state a claim or controver-

[781]

sy and is not justiciable. The Court is aware of the fact that the area of justiciability and doctrines such as case and controversy, standing and mootness afford a court substantial discretion to refuse to review a case which it does not wish to entertain. However, the Court firmly believes that the issue raised in the third and fourth claims for relief is precisely the kind of matter for which the justiciability doctrine may be most appropriately invoked.

III.

The plaintiffs, in their fifth and sixth claims for relief, challenge the provision which allows for the appointment of members of the Student Honor Court on the basis of race. The Student Honor Court is a judicial body entrusted with trial and punishment powers in matters of student discipline. Its members are elected and appointed, but if requested by a defendant before the Honor Court, provision is made for racial or sexual representation which involves the appointment as court judges of four persons (out of a total of seven) of the defendant's race and/or sex.

The defendants contend plaintiffs lack standing to raise this challenge since they cannot demonstrate any injury resulting from these provisions. Adopting the standard set forth in *Association of Data Processing Serv. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), that the interest sought to be protected by the claimant must be within the zone of interests protected by the statute or constitutional provision invoked, the defendants advocate dismissal on the grounds that plaintiffs cannot prove denial of equal protection which is the interest protected by 42 U.S.C. § 1983 and § 2000d.

The plaintiffs assert standing as students, taxpayers to the State, and fee-payers to the University, contending they should be allowed to attend a state-supported university free from officially imposed or sanctioned racial discrimination and not be compelled, as taxpayers and feepayers, to subsidize a racially discriminatory program or activity. Plaintiffs also cite recent United States Supreme Court cases to the effect that a person need have only a little stake in the outcome of the litigation to maintain a suit and that those who are not the direct objects of discrimination nonetheless may have standing to challenge discriminatory practices. *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205, 210, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972).

While the Court is inclined to agree with the plaintiffs on the standing issue because of the significant relaxation of the standing requirement in *SCRAP* and *Trafficante*, it is concluded that this challenge to the honor court provision should be dismissed for the reasons the claim concerning CGC representation was dismissed in Part II.

[6, 7] Firstly, the claim challenging honor court appointments does not state a case or controversy since the appointment provision does not discriminate against anyone. It may be invoked by all students, black and white, male and female, and while such a provision may be questioned on the grounds of political or social desirability or even judicial impartiality, it does not have the effect of discrimination. In the *Trafficante* case, the plaintiffs were not the objects of the alleged discrimination, but their challenge under the Fair Housing Act to the rental practices of the apartment in which they lived was found to present a case or controversy in that they did allege racial discrimination against others who sought housing in their unit. 409 U.S. at 211-12, 93 S.Ct. 364. The subject case is distinguishable, however, in that the practices challenged here do not discriminate against the plaintiffs or anyone else at the university. Therefore, while the Court would agree that plaintiffs have standing to challenge discriminatory practices imposed or sanctioned by the University, even if these practices do not directly or seriously affect them, this claim must be dismissed for failure to state a case or controversy.

[782]

[8] Secondly, the Court feels this claim, similar to the challenge to CGC representation, is not justiciable since the issue is not appropriate for judicial review and the denial of review will not impose a hardship on any of the litigating parties. While the claim is a maverick in that it cannot be neatly classified as a political question, advisory litigation or a moot controversy, it does not raise issues for resolution which would have anything more than a very nominal impact on the rights or interests of the litigating parties. Judicial review of this claim would be more akin to an academic exercise than a substantial legal dispute. Therefore, summary judgment is granted in favor of the defendants on the fifth, sixth, eleventh and twelfth claims for relief on the grounds that the claims do not present a case or controversy and are not justiciable.

It is realized that the resolution of the CGC and honor court disputes in this manner, if upheld, effectively precludes the possibility that these practices can ever be ruled upon in a court of law. While the potential scope of 42 U.S.C. § 2000d is still uncertain[4] and the coverage of 42 U.S.C. § 1983 expanding, the Court is of the opinion that

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4. It is not clear to what extent Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) will ultimately allow private parties to remedy discrimination or compel desegregation in federally funded activities. Antieau, **Federal Civil Rights Act**, § 138 at 182. An enumeration of practices which would violate 42 U.S.C. § 2000d, set forth by a leading commentator, arguably

the claims raised by the plaintiffs do not state a case or controversy even within the most liberal interpretation of those statutes.

Accordingly, a judgment will be entered.

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includes the CGC and honor court provisions challenged here in that they subject individuals to different treatment because of race. Antieau, § 137 at 181-82. However, the practices challenged here neither encourage discrimination nor discourage racial integration in any way and, therefore, do not, it is concluded, state a case or controversy under the most liberal reading of 42 U.S.C. § 2000d. Cf. Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973).

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547 F.2d 801 (1977)

In The

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

NO. 75-2276

Lawrence A. UZZELL and Robert Lane Arrington, Individually, and upon behalf of all others similarly situated,

Appellants,

v.

William C. FRIDAY, Individually, and as President of the University of North Carolina, et al.,

Appellees.

Argued June 10, 1976.

Decided Jan. 5, 1977.

[802]

Hugh J. Beard, Jr., Charlotte, N.C., for appellants.

Andrew A. Vanore, Jr., Senior Deputy Atty. Gen., Raleigh, N.C., Karen Bethea Galloway, Durham, N.C. (James V. Rowan, Paul, Rowan & Galloway, Durham, N.C., Rufus L. Edmisten, Atty. Gen. of North Carolina, Raleigh, N.C., on brief), for appellees.

Before BRYAN, Senior Circuit Judge, WIDENER, Circuit Judge, and KUNZIG, Judge, United States Court of Claims.*

ALBERT V. BRYAN, Senior Circuit Judge:

In controversy in this appeal is the legality of the following practices at the University of North Carolina: (1) the continuance of an allotment to the Black Student Movement

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* Sitting by designation.

(BSM), a student organization, of a share in the mandatory Student Activities Fees required to be paid the institution on enrollment; (2) limitations based solely upon race on the appointment and membership of minority representatives in the Campus Governing Council; and (3) restrictions based exclusively on race for appointments to the Student Honor Court.

A suit to nullify these intramural practices was commenced on June 13, 1974 in the District Court by two current students, Lawrence A. Uzzell and Robert Lane Arrington, as a class action, naming as defendants William C. Friday, President of the University, its officers and its Board of Trustees, its officers and its Board of Trustees. The Chairman and Vice-President of the BSM were later added as defendants.

These practices were assailed as contravening the Fourteenth Amendment, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d.[1] As will appear more particularly *infra*, the general offensiveness ascribed to the usages is that they contemplate racial qualifications that cause the plaintiffs to suffer disadvantages at the University because they are not of the favored race. As this differentiation derives from the action of a State

1. "§ 1983. **Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

"§ 2000d.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

agency[2]—the University—which admittedly receives Federal financial assistance in the form of grants and contracts, these detriments could constitute deprivations and discriminations condemned in the cited constitutional and statutory safeguards.[3]

Examining each of the practices in this light, we affirm the District Court's sum-

[803]

mary judgment on defendants' motions as to financial support of the Black Student Movement but reverse the summary judgments as to minority representation on the Council and the Honor Court.[4]

[1] With the District Judge we see the plaintiffs as having standing to prosecute each of these claims. See *United States v. SCRAP*, 412 U.S. 669, 686-87, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). Moreover, his rejection of the defendants' motion to dismiss for plaintiffs' failure to exhaust State administrative remedies is accepted under the holding of *McCray v. Burrell*, 516 F.2d 357 (4 Cir. 1975), cert. dismissed as improvidently granted, 426 U.S. 471, 96 S.Ct. 2640, 48 L.Ed.2d 788 (1976).

Student Government

The President of the Student Body of the University is the chief executive officer of the student government. Since 1972, its legislative branch has taken the form of a Campus Governing Council (CGC) of 18 members. They

2. Arrington v. Taylor, 380 F.Supp. 1348 (MDNC 1974), aff'd in unpublished opinion (4 Cir. August 4, 1975) (No. 74-2080).

3. Jurisdiction is afforded here by 28 U.S.C. §§ 1331 and 1343 as the suit involves a Federal question and civil rights.

4. Our disposition of the case renders superfluous consideration of the appropriateness of the litigation as a class action. See footnotes 5 and 7 infra.

are elected annually by and from the student body and each student in good standing, like the plaintiffs, is eligible to vote in the election of its members. The judicial branch includes the Honor Court of the Student Body (SHC).

I. *Black Student Movement*

In 1967 a group of students formed the Black Student Movement to promote black culture and identity among black students. The organization was officially recognized by the University and was permitted to use the latter's facilities. It was also assigned office space in the Student Union Building. Since 1969, with the exception of the 1970-71 academic year, the BSM has received yearly appropriations —ranging from $6,400 to $12,000—from funds derived from the Student Activities Fees. The money thus provided has been used to support many programs of the organization, including cultural and entertainment events as well as publication of a newspaper, ***Black Ink***.

Upon its inception the BSM adopted a constitution stating that "Any Black student can be a member of the BSM." Similarly, as revised in 1971, it declared that "The members of the Black Student Movement shall be every Black student enrolled in the University of North Carolina at Chapel Hill." Now, through amendment in September 1974, the pertinent article provides that members of the BSM shall include any student whose views are consistent with the goals of the BSM. So, say the defendants, BSM membership is open to all students supporting its aims. Accordingly, the District Court held the plaintiffs' charges to be moot, dismissing them for that reason.

[2] The District Judge made fact findings that adequately underprop this holding: aside from the BSM's own curative rescission of the race qualification, the actions and representations of the defendants, including the University, are cited to demonstrate the absolute removal of the exclusivity of black membership. In denying relief, he concluded that the indications and probability for future reinstitution of the discrimination showed apprehension thereof too remote to warrant equitable measures. We are satisfied to affirm on these assurances of the District Judge. *Uzzell v. Friday*, 401 F.Supp. 775, 777-79 (MDNC 1975).[5]

II. *Campus Governing Council*

Plaintiffs challenge the Student Constitution's provisions for membership on the

[804]

Council as violative of their civil rights in that it stipulates that the Council shall include "at least two Councillors of a minority race within the Student Body (if any), two male Councillors and two female Councillors". They further provide that, in the event an annual election does not produce such representation, "the President of the Student Body, with the consent of the Council, shall make the number of appointments necessary to ensure compliance with this section."

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5. Since we affirm the decision of the District Judge as to the BSM, we agree with him that consideration of the appropriateness of this aspect of the litigation as a class action is unnecessary. Our holding today is therefore limited to the named plaintiffs and does not affect the rights of other members of the alleged class. Nevertheless, we concur with the District Judge's admonition of defendants that "if the University should intentionally or unintentionally again begin to fund any racially exclusive organization or should the BSM not be truly open to members of all races while it receives state funds, the Court will not be reluctant to entertain this same law suit." 401 F. Supp. at 779.

The trial court dismissed for lack of the constitutional jurisdictional exaction—that there be an actual case or controversy—in this aspect of the plaintiffs' grievances. 401 F.Supp. at 779-81. First, it was noted that these organizational prescriptions of the CGC had never been activated and that consequently "no rights of the plaintiffs have been affected". Again, the Court on this theme concluded that these features of the CGC were "in no way discriminating toward plaintiffs" for they ensure representation on the CGC to all classes—blacks, women and males. As an overall reason, however, the Court felt "'there is no sufficient need for deciding the issues . . .' Wright, Miller & Cooper, §3529 at 153". 401 F.Supp. at 780.

[3] We cannot affirm the dismissal, but rather find that plaintiffs stated a justiciable cause of action. We reverse now on the plain and simple ground that, without either reasonable basis or compelling interest, the composition of the Council is formulated on the basis of race. This form of constituency blatantly fouls the letter and the spirit of both the Civil Rights Acts and the Fourteenth Amendment. A reading of them, particularly Section 2000d, is all that is needed for authentication of this conclusion. See footnote 1, *supra*. Additionally, see: *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 96 S. Ct. 2574, 49 L.Ed.2d 493 (1976); *Lige v. Town of Montclair*, 72 M.J. 5, 367 A.2d 833 (1976) (No. A-107); *Bakke v. Regents of the University of California*, 18 Cal.3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976).

III. *Student Honor Court*

[4] Since October 2, 1974 an accused has been permitted to request that four of the seven judges on the trial

bench of an Honor Court be of his or her race or, in the alternative, of his or her sex.[6]

Plaintiffs' challenge to this article of student government was dismissed by the District Judge upon the same grounds as he struck down the present provisions for CGC composition—lack of case or controversy. 401 F.Supp. at 781-82. For the same reasons as we disagreed there with the District Court's judgment we do so here: the selection of the SHC panel is related to race with no reasonable or compelling nexus to that classification.

[5] In summary we affirm the decision of the District Court as to the finding of

[805]

the Black Student Movement but reverse the District Court's grant of summary judgment as to the composition

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6. The University's Instrument of Student Judicial Governance of 1974 provides, in pertinent part:

"e. Trial Courts

• • •

2) If requested by the defendant, provision shall be made for racial or sexual representation (but not both) on the trial court, as follows:

a) At least four of the seven members of the trial court shall be of the same sex as the defendant;

b) When a defendant is not a member of the majority race, at least four of the seven members of the trial court shall not be of the majority race;

c) When a defendant is a member of the majority race, at least four of the seven members of the trial court shall be of the majority race.

3) Each trial court shall be selected by the Court Administrator under the procedures described below.

(Continued on next page)

of the Council and the Honor Court.[7] Although the plaintiffs did not move either this Court or the District Court to grant summary judgment in their favor, we clearly have power to do so. Appellees' briefs contain nothing to suggest that we should not follow that course of action if we determine to reverse and, while the affidavits are in conflict on some points, none of these inconsistencies has dispositive significance in the view we take of the case.[8]

Accordingly, we think it is "just under the circumstances" for this Court to remand with directions that the District Court enter summary judgment for the plaintiffs. *Morgan Guaranty Trust Co. v. Martin*, 466 F.2d 593, 600 (7 Cir. 1972), *quoting* 28 U.S.C. §2106.

Affirmed in part, reversed in part, and remanded with directions.

(6. Continued)

* * *

d) If the defendant has requested racial or sexual representation on the trial court, the members of the trial court shall be selected by random drawing from the pool of the entire court panel of a number not to exceed that which will permit the sexual or racial representation requested; and by random drawing from another pool appropriate to insure that representation."

7. Although we are inclined to the view that the CGC and SHC aspects of this litigation could appropriately go forward as a class action under FRCP 23(a) and (b), **see Potts v. Flax**, 313 F.2d 284, 289 (5 Cir. 1963), it is not necessary to reach the class action issue.

"By the very nature of the controversy, the attack is on the unconstitutional practice of racial discrimination. Once that is found to exist, the Court must order that it be discontinued. [While the decree] . . . might name the successful plaintiff as the party not to be discriminated against, . . . that decree may not—either expressly or impliedly—affirmatively authorize continued discrimination by reason of race [or sex] against others." **Id.** (citation omitted). Thus any error in determination of the appropriateness of class action here would be harmless since the decree for all practical purposes would be the same whether entered on behalf of the alleged class or confined to named plaintiffs. **Id.** at 289-90.

8. **Compare Abrams v. Occidental Petroleum Corp.**, 450 F.2d 157, 165-66 (2 Cir. 1971), **aff'd sub nom. Kearn County Land Co. v. Occidental**

(Continued on next page)

(8. Continued)

Petroleum Corp., 411 U.S. 582, 93 S.Ct. 1736, 36 L.Ed.2d 503 (1973) and **Morgan Guaranty Trust Co. v. Martin**, 466 F.2d 593, 599-600 (7 Cir. 1972) with **Fountain v. Filson**, 336 U.S. 681, 69 S.Ct. 754, 93 L.Ed. 971 (1949) **and Kern County Land Co. v. Occidental Petroleum Corp.**, 411 U.S. at 605, 614-17, 93 S.Ct. 1736 (Douglas, J., dissenting); **see** 6 Moore's Federal Practice 56.27[2], 56.12.

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558 F.2d 727 (1977)

In The

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

NO. 75-2276

Lawrence A. UZZELL and Robert Lane Arrington, Individually, and upon behalf of all others similarly situated,

Appellants,

v.

William C. FRIDAY, Individually, and as President of the University of North Carolina, Ferebee Taylor, Individually and as Chancellor, Claiborne Jones, Individually and as Vice-Chancellor, Marcus Williams, President of Student Body, Timothy Dugan, Individually and Treasurer, etc., Board of Trustees of the University of North Carolina at Chapel Hill, and Board of Governors of the University of North Carolina, and Algenon L. Marbley, Chairman of the Black Student Movement, and Robert L. Wynn, II, Vice-Chairman of Black Student Movement,

Appellees.

Argued June 8, 1977.

Decided July 28, 1977.

Hugh J. Beard, Jr., Charlotte, N.C., for appellants.

Andrew A. Vanore, Jr., Senior Deputy Atty. Gen., Raleigh, N.C. (Rufus L. Edmisten, Atty. Gen., North Carolina, Raleigh, N.C., on brief), for appellees.

Karen Bethea Galloway, James V. Rowan, Paul, Rowan & Galloway, Durham, N.C., on brief for defendant-intervenors.

Before HAYNSWORTH, Chief Judge, BRYAN, Senior Circuit Judge, and WINTER, BUTZNER, RUSSELL, WIDENER and HALL, Circuit Judges.

OPINION ON REHEARING IN BANC

ALBERT V. BRYAN, Senior Circuit Judge:

Upon rehearing in banc, the opinion heretofore filed in this appeal, 547 F.2d 801 (4 Cir. 1977), is confirmed with two additions:

(1) A statement will be included in Section II of the opinion, as it appeared in the first order denying a panel rehearing, viz, that after the decision of the District Court but before this appeal came on for argument the Student Constitution provision for appointment by the President of the Student Body, with the consent of the Campus Governing Council, of up to two members of the minority race as Councillors, in the event that the annual election had secured Council office for fewer than two such members, had been invoked and satisfied by appointment of a black student as a Councillor.

(2) To the citations at 547 F.2d at 803, line 10, will be added that of *Carter v. Jury Commission of Greene County*, 396 U.S. 320, 329, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970), for the point that plaintiffs herein have standing to sue.

The Clerk is now directed to enter an order affirming the panel decision, 547 F.2d at 801, subject to the additions noted above, and reversing and remanding the judgment of the District Court consistent with that decision.

WINTER, Circuit Judge, with whom HAYNSWORTH, Chief Judge, and BUTZNER, Circuit Judge, join, concurring and dissenting:

I would affirm the order of the district court in its entirety, for the reasons sufficiently stated in the district court's opinion. *Uzzell v. Friday*, 401 F.S. 775 (M.D. N.C. 1975).

I.

I agree with the majority that the district court cannot be faulted for concluding that the issue of university funding of the Black Student Movement is moot.

As to the issue of the validity of the university regulations which allow the student body president to appoint two black members to the Campus Governing Council if two have not been elected, I think that plaintiffs lack standing to sue because there is no actual or threatened injury to them.

[728]

They have not been threatened with loss of representation as whites. They have not been denied the right to vote; nor has the weight of their vote been diluted. They have not been denied the right to seek election and to win. The fact that potential black appointees may cast the deciding vote on a close issue before the Council, in derogation of plaintiffs' interests, is too remote and speculative for serious consideration.

Finally, as to the issue of the validity of the regulation permitting an accused before the Honor Court to request that a majority of the judges reflect his race and sex (white, black, male, or female), I think that plaintiffs have failed to establish standing to sue and have failed to show a case or controversy, i.e. an actual dispute reflecting competing interests. This regulation does not discriminate; *any* student may request majority representation of that student's race and sex. Surely a non-offender, of a race or

sex different from the accused, has no right or privilege to insist that the accused be judged by less than the peers of the accused. Conversely in a geographical area where racial discrimination has been known, the university has an interest in the appearance of justice, as well as justice in fact.

II.

On the merits of the case, I and some of my brothers are outvoted. This is understandable, but what is totally inexplicable is that the majority rushes to final judgment without affording the defendants either their rights under Rule 56, F.R.Civ.P., or elemental procedural due process of law.

When defendants moved for summary judgment, they did so on the grounds that plaintiffs' claims were moot, that plaintiffs' claims failed to establish a case or controversy, that plaintiffs had failed to exhaust their administrative remedies and that the plaintiffs lacked standing to sue. Defendants did not assert that on the merits they were entitled to *summary* judgment and plaintiffs made no such claim either. Indeed, even before us, plaintiffs ask only that we vacate the judgment of the district court "and remand this case for trial upon the merits."

Of course, in a proper case, a trial court may render a summary judgment *against* a party who has moved for summary judgment in his favor, even though the opposing party, to whom summary judgment is granted, did not file a cross motion. And I do not dispute that an appellate court, in a proper case, may do the same thing. But this is not a proper case in which the power we possess should be exercised.

In the record before us, there was some general discovery by way of requests for admissions, answers to interrogatories and production of documents, but I do not read them to tell the whole story of the history of discrimination or non-discrimination at the university, the need for remedial measures, the reasonableness of the measures and how, in practice, they have operated. I think that these are all factors bearing on the ultimate merits. Certainly the parties, as well as the district court, did not and do not treat the record as complete for purposes of final adjudication on the merits. Even if the majority thinks otherwise, I suggest that in the sensitive, expanding area of the law of racial discrimination, the majority should recognize that it is not unlikely that the majority's view of the merits may not be the final say and that in equity and good conscience, the parties should be given the opportunity to make the record on which they must stand or fall.

Until it reached us, the case was litigated and decided on procedural or preliminary grounds not dispositive of the merits. By converting the case into a final adjudication on the merits when neither party contemplated or requested it and when neither party has had the opportunity to present any additional relevant proof, the majority denies to the losing party, as well as the party prevailing, the very rights that we have assiduously preserved for uncounseled litigants in summary judgment actions. *Roseboro v. Garrison*, 528 F.2d 309 (4 Cir. 1975)—fair notice and an opportunity to respond. The majority thus violates Rule 56 and denies procedural due process of law. Surely the parties, including the State of North Carolina, deserve fairer treatment.

From the majority's partial reversal, I respectfully dissent.

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591 F.2d 997 (1979)

In The

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

NO. 75-2276

Lawrence A. UZZELL and Robert Lane Arrington, Individually, and upon behalf of all others similarly situated,

Appellants,

v.

William C. FRIDAY, Individually, and as President of the University of North Carolina, Ferebee Taylor, Individually and as Chancellor, Claiborne Jones, Individually and as Vice-Chancellor, Marcus Williams, President of Student Body, Timothy Dugan, Individually and Treasurer, etc., Board of Trustees of the University of North Carolina at Chapel Hill, and Board of Governors of the University of North Carolina, and Algenon L. Marbley, Chairman of the Black Student Movement, and Robert L. Wynn, II, Vice-Chairman of Black Student Movement,

Appellees.

Argued Nov. 16, 1978.

Decided Feb. 2, 1979.

Hugh J. Beard, Jr., Charlotte, N.C., for appellants.

J. LeVonne Chambers, Charlotte, N.C. (Charles Becton, James C. Fuller, Jr., Chambers, Stein, Ferguson & Becton, P.A., Charlotte, N.C., Karen Galloway, Durham, N.C., Jack Greenberg, James M. Nabrit, III, Napoleon B. Williams,

Jr., Judith Reed, New York City, on brief), Elizabeth C. Bunting, Asst. Atty. Gen., Raleigh, N.C. (Rufus L. Edmisten, Atty. Gen. of North Carolina and Andrew A. Vanore, Jr., Senior Deputy Atty. Gen., Raleigh, N.C., on brief), for appellees.

Before HAYNSWORTH, Chief Judge, BRYAN, Senior Circuit Judge, and WIN-

[998]

TER, BUTZNER, RUSSELL, WIDENER and HALL, Circuit Judges.

ALBERT V. BRYAN, Senior Circuit Judge:

Obedient to the remittitur of the Supreme Court in vacating our judgment,[1] this court has given the case "further consideration in light of *Regents of* [*the*] *University of California v. Bakke*, 438 U.S. 265 [98 S.Ct. 2733, 57 L.Ed.2d 750] (1978)."[2] To be reexamined is the conclusion of invalidity laid, in the suit of appellant-white students, to two of the regulations and practices approved and effectuated by the University of North Carolina in its student government.

The first regulation in issue pertains to the legislative branch, the Campus Governing Council (CGC), elected annually by the student body. The CGC is composed of 18 members, but must include "at least two Councillors of a minority race within the Student Body (if any), two male Councillors and two female Councillors."[3] If the election does not satisfy this contingency, then the President of the

1. **Uzzell v. Friday**, 558 F.2d 727 (4th Cir. 1977); **Uzzell v. Friday**, 547 F.2d 801 (4th Cir. 1977).

2. 438 U.S. 912, 98 S.Ct. 3139, 57 L.Ed.2d 1158 (1978).

3. University of North Carolina Student Constitution art. I, § 1.D.

Council (the president of the student body) shall make appointments from the students generally to fulfill this requisite.

The second questioned requirement relates to the composition of the judicial branch of the government, the Honor Court of the Student Body. Abbreviated, this latter provision stipulates that an accused, on request, is entitled to have four of the seven judges of the court of his or her race or sex.[4]

Appellants charge that these regulations and practices, in relying *exclusively* on a racial criterion, deny them their Fourteenth Amendment rights of equal protection, and violate the Civil Rights Act of 1871 and Title VI of the Civil Rights Act of 1964.[5]

Bakke, we recognize, unequivocally pronounces that in State educational institutions race may be a consideration in fixing the rights of students, but at no stage did the

4. The Instrument of Judicial Governance for the University of North Carolina at Chapel Hill art. IV, § E(2)(e)(2) reads as follows:

e. Trial Courts

• • •

2) If requested by the defendant, provision shall be made for racial or sexual representation (but not both) on the trial court, as follows:

a) At least four of the seven members of the trial court shall be of the same sex as the defendant;

b) When a defendant is not a member of the majority race, at least four of the seven members of the trial court shall not be of the majority race;

c) When a defendant is a member of the majority race, at least four of the seven members of the trial court shall be of the majority race.

5. U.S. Const. amend. XIV, § 1; Civil Rights Act of 1871, codified at 42 U.S.C. § 1983 (1970); and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

Court affirm that race could be the sole determinant in any such adjustment. 438 U.S. 265, 98 S.Ct. 2733. As Mr. Justice Powell put it for the majority:

> When a classification denies an individual opportunities or benefits enjoyed by others *solely* because of his race or ethnic background, it must be regarded as suspect. (Accent added.)

Id. at 305, 98 S.Ct. at 2756.

I.

[1] The permeating defect in the organization of CGC, the governing council, is the imposition of an artificial racial structure upon this elective body that bars non-minority students from eligibility for appointment to the Council. This resort to race affronts *Bakke*. Although the regulation in question seeks to provide "protective representation," its effect is to establish a racial classification, as it relies exclusively on race to preclude non-minority students from enjoying opportunities and benefits available to others. *See id.* 265, 98 S.Ct. 2733.

[999]

Aggravation of the incursion upon appellant white students' rights becomes immediately apparent upon recalling that the CGC President picks additional minority students to satisfy the requisite racial composition without an election. Appellants are ineligible for appointment to the Council because they are not of a minority race. Furthermore, the presence of one or more unelected members on the Council dilutes the representative character of the legislative body. Students are entitled to the assurance that their legislative, established at a State institution, is entirely free from the taint of

racial preference. Disenfranchisement because of race entrenches upon their Constitutional and statutory rights. *Supra* note 5.

In *Bakke*, Justice Powell reiterated "that in 'order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.'" (Citations omitted.) 438 U.S. at 305, 98 S.Ct. at 2756. Inclusion in the CGC of unelected Councillors is not indispensable to assure representation of minority students. As noted in *Bakke*:

> Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. . . . [P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.

Id. at 298, 98 S.Ct. at 2753.

II.

[2] The Honor Court is, of course, for the trial of students accused of conduct dishonorable or otherwise hurtful to the student body, as well as to other pupils individually. It is in the nature of an intramural judicial tribunal of seven lay jurors or judges. Its organic regulation allows race to be a dominant consideration in impaneling the court, obviously a vital juncture in the trial process. This focus on race is achieved by permitting

the defendant to insist that a majority of his triers be of his race. That such recourse to race would be a preposterous defiance of the Fourteenth Amendment and the Civil Rights Acts, *supra*, note 5, in a trial beyond the University walls needs no exposition. Its denial of equal protection within the academic community is no less clear, for there race may be invoked in a trial adjudging the character of a student.

Extending the choice of his judges' racial complexion to a student on trial for misconduct is a potential invasion both of the rights of the other students singly and as a body. They need the protection afforded by the court to prevent any injury to them which the particular defendant's offense might cause. The non-offenders' confidence in the Honor Court logically is diminished when they know that by regulation race may influence the court's judgment. Their position can be likened to the public's in a criminal prosecution, where the prosecution, like the defendant, is entitled to a jury not drawn with an eye to race.

The stern, sincere and unanimous desire for fairness, both in truth and in theory, cannot override the stubborn fact that the system adopted by the University perpetuates inequity instead, thus infringing upon the interests of all students. The just solution is to remove race altogether from the high court regulation, as the appellants pray. Otherwise, it will bar them of the assurances of equal treatment under the Constitution and laws of the United States. *Supra* note 5.

III.

There is no justification for appellees' insistence that the cause be remanded to the District Court to take additional evidence that, they assert, reflects prior discrimination at the University, or depicts the regulations as an effort by the University to develop a "diverse student body" or to

[1000]

achieve other related aims. *Bakke* suggests that racial preferences may be approved upon the finding of a continuing Constitutional or statutory violation, as long as others are not prejudiced by the remedial course adopted. 438 U.S. 265, 98 S.Ct. 2733. The method here chosen for eradicating possible earlier discrimination could not be accepted, even if history revealed such conduct, because, as we have seen, the supposedly remedial measures presently enforced impinge upon the rights of others.

Conclusion

Finally, the University of North Carolina has failed to demonstrate that the accomplishment of the State's purpose necessitates its use of a suspect classification in the two student government regulations before us. Accordingly, summary judgment will go for the appellants, holding the regulations invalid, and, to that extent, reversing the judgment of the District Court.

Reversed with Summary Judgment.

WINTER, Circuit Judge, with whom HAYNSWORTH, Chief Judge, and BUTZNER, Circuit Judge, join, dissenting:

Because we think that faithful compliance with the mandate to reconsider this case in the light of ***Regents of University of California v. Bakke***, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), requires a remand to the district court for the taking of evidence and for findings

of fact, we respectfully dissent. Additionally, we think that on remand the district court should make a determination as to whether the case is moot.

I.

The majority, on an incomplete record as we shall show, invalidates two regulations. The first requires that the 18-member Campus Governing Council have "a protective representation of minority races and both sexes by being composed of at least two members of a minority race within the student body, two male members and two female members. If, as a result of student elections, these minimum requirements are not met, the president of the student body, with the consent of the council, shall appoint additional members, who have the same rights, privileges and duties as elected members, to satisfy the formula. From the present record, it appears that it has never been necessary that the power of appointment be exercised to meet the minimum requirements of minority racial representation.

The second is a guarantee that an accused required to appear before an Honor Court may, on his request, require that four of the seven judges of the Court be of his or her race or sex. It should be noted that this regulation is facially neutral both as to race and as to sex; the right to have a majority of the judges of the same race and sex as the accused extends to a student of either sex and of any race.

As we pointed out in our earlier dissent, the record before us contains some general discovery by way of requests for admissions, answers to interrogatories and production of documents. 558 F.2d at 728. But these disclosures fall well short of telling the whole story of the history of discrimination or non-discrimination at the university, the need for remedial measures, the reasonableness of the

measures and how, in practice, they have operated. Short of such proof and findings of fact derived therefore, we do not think that this case can be properly decided.

Bakke does not hold that in all events racial criteria may not be the sole determinant in fixing the rights of students. True, *Bakke* recognizes that race is a suspect classification, but the significance of the classification is, as Mr. Justice Powell for the Court explains, only that the State, in order to sustain the validity of its use of the criterion, "must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." 438 U.S. at 305, 98 S.Ct. at 2756 (quoting from *In re Griffiths*, 413 U.S. 717, 722-23, 93 S.Ct. 2851, 37

[1001]

L.Ed.2d 910 (1973)). Having reaffirmed that general principle, Mr. Justice Powell added, "[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." 438 U.S. at 307, 98 S.Ct. at 2757.* Of course, Mr. Justice Powell continued, the Court "has never approved a classification that aids persons perceived as members of relatively victimized

*After the mandate of the Supreme Court issued in the instant case, the University moved for a remand to the district court for a trial on the merits. After pointing out that the present record is not full and complete, the university tracked the language quoted in the text asking that it "be afforded an opportunity to present evidence of its "legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.'" Indeed, it rightfully argued that procedural due process required that it be given this opportunity.

groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." 438 U.S. at 307, 98 S.Ct. at 2757. But, "[a]fter such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial since the legal rights of the victims must be vindicated." 438 U.S. at 307, 98 S.Ct. at 2758.

Contra to the views of the majority, we read *Bakke* both to recognize and to approve, as a general principle, the use of racial criteria in remedial steps to redress wrongs worked by adjudicated instances of racial discrimination, provided only that the remedial steps "work the least harm possible to other innocent persons competing for the benefit." 438 U.S. at 308, 98 S.Ct. at 2758. That is the very reason why we think this case should be remanded and a full trial conducted. The present record simply does not permit a firm conclusion as to the extent of discrimination at the University of North Carolina and the need for and efficacy of the present regulations. The majority's condemnation of the regulations because they impinge upon the rights of others is simplistic. *Bakke* teaches that as a necessary remedial measure a victimized group may be preferred at the expense of other innocent persons. What cries out for determination in the instant case is whether such preferment is justified under the principles of *Bakke*.

II.

This litigation began on June 13, 1974 by plaintiffs then students at the University. They were joined by other students who sought to intervene on September 13, 1974, and whose intervention was allowed. Although the com-

plaint sought certification for a class action, the district court did not act upon the request. Additional interventions were sought from us, and on April 18, 1978, we referred the motions to the district court. The present record does not disclose what action the district court took thereon.

The fact that even with scholastic success the period that a student is enrolled in a University is limited and the fact that, absent certification of a class, there have been repeated efforts to intervene in the litigation suggest to us the possibility that the litigation has become moot. Thus, it is quite possible that the action may have been mooted by the departure of all named plaintiffs from the University before other students sought intervention. If, in accord with our views, the case were remanded for trial on the merits, we would direct the district court first to consider if the case has become moot either because all named plaintiffs have severed their connection with the University, or at some stage of the proceedings no named plaintiff had maintained a continuing connection with the University.